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VIA HAND DELIVERY

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AUG - 8 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 8, 2003

EX PARTE

Marlene Dortch
Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S W
Washington, D C 20554

Re *Ex Parte* Presentation
CC Docket Nos 02-33, 98-10, 95-20

Dear Ms Dortch

On August 7, 2003, Dave Baker, Vice President for Law and Public Policy of EarthLink, Inc , Donna N Lampert, and the undersigned, both of Lampert & O'Connor P C , met with Chairman Michael Powell and Christopher Libertelli, Legal Advisor to Chairman Powell, to discuss the above-referenced proceedings.

EarthLink discussed its position described in documents previously filed in the above-referenced dockets EarthLink described its experience as a major independent high-speed Internet service provider (ISP) delivering DSL-based Internet access to hundreds of thousands of consumers in the U S Demonstrating the importance of customer choice in DSL-based service providers, EarthLink explained that it just this week won the J D Power and Associates Award for Highest Customer Satisfaction Among High-Speed Internet Service Providers and won the same award in 2002 A copy of the EarthLink press release is attached hereto, and was distributed during the meeting

EarthLink explained how it uses the FCC's tariffing process in conjunction with commercial negotiations and contractual arrangements for non-regulated information services EarthLink also discussed operational issues, noting that while relationships with some carriers are good, issues such as discrimination, slamming, unreasonable delay, and anticompetitive pricing issues do arise EarthLink also emphasized that it, like many ISPs, is at a critical juncture regarding broadband offerings and that an FCC decision that impedes its investment in broadband ISP services and applications or that imposes legal uncertainty would be contrary to

the continued deployment, adoption and quality of broadband information services and Internet access

EarthLink stressed that information services should not be regulated and expressed support for an FCC policy that continued to foster information services competition EarthLink also agreed that the FCC should seek to streamline regulation as markets and technology changes, and noted that the FCC has ample authority to change its approach under Title II to rely more on enforcement rather than specific regulatory proscriptions. To highlight the current regulatory requirements, EarthLink provided Chairman Powell and Mr Libertelli a copy of the attached "Summary of FCC's Computer Inquiry Requirements," which has been previously filed in the above-referenced dockets EarthLink explained that an enforcement-centric approach could provide effective deterrence to anticompetitive practices. EarthLink urged that what the FCC cannot do, however, is abrogate the public interest mandate to check anticompetitive conduct Private carriage cannot be a "green light" for unreasonable and discriminatory conditions EarthLink also explained that discrimination in BOC transmission service offerings would negatively impact and frustrate information service investment and competition

EarthLink emphasized that the use of Title I authority as some Bell Operating Companies (BOCs) have proposed would create substantial legal and regulatory uncertainty Not only is the Commission's authority to use Title I uncertain, the FCC would need to establish an entirely new mechanism and potential aggrieved parties and the FCC would be without the benefit of decades of enforcement precedent. EarthLink also stressed that there is a strong risk that the novel use of Title I would be overturned, as there may be no legitimate nexus for the proposed exercise of Title I authority Finally, EarthLink discussed the complex issues that would arise with a shift of BOC DSL services from Title II to Title I authority, including cost allocation issues and the process of transition from tariffing

Pursuant to the Commission's Rules, six copies of this letter/memorandum are being provided to you for inclusion in the public record in each of the above-captioned proceedings Should you have any questions, please contact me

Sincerely,

Mark J O'Connor
Counsel for EarthLink, Inc.

CC Chairman Michael Powell
Christopher Libertelli, Esq
Qualex

FOR IMMEDIATE RELEASE

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EARTHLINK HIGH SPEED INTERNET SERVICE RANKED HIGHEST IN CUSTOMER SATISFACTION BY J.D. POWER AND ASSOCIATES

EarthLink Garners Top Honors for Second Consecutive Year

ATLANTA, Aug. 5, 2003 - - EarthLink (NASDAQ: ELNK), one of the nation's leading Internet service providers, today announced that its high-speed Internet service has been recognized by J.D. Power and Associates in its 2003 Internet Service Provider Residential Customer Satisfaction Study℠ with the highest ranking in customer satisfaction for the second year in a row.

"J.D. Power and Associates sets the standard for excellence and achievement, and being singled out for overall customer satisfaction for the second year in a row reinforces our commitment to provide the best Internet experience to EarthLink subscribers," said Karen Gough, executive vice president of marketing for EarthLink. "This honor will help to further differentiate our high-speed service, which continues to play a prominent role in EarthLink's overall growth strategy."

Consumers participating in the J.D. Power and Associates Internet Service Provider Residential Customer Satisfaction Study℠ rated both national and regional ISPs on seven different factors that comprise the overall customer satisfaction index. EarthLink's top position among broadband providers results from receiving the highest scores in the industry for customer service, e-mail services, cost of service, billing, image, and offerings and promotions.

As part of EarthLink's commitment to customer satisfaction, the company is aggressively rolling out new products and services to further extend its value proposition. These features, available to all EarthLink High Speed subscribers include: spamBlocker, which eliminates virtually 100 percent of all junk e-mail messages, and Pop-up Blocker℠, which helps block annoying pop-up ads.

About EarthLink High Speed Internet

With more than 993,000 high speed subscribers, EarthLink is one of the country's leading broadband Internet service providers. EarthLink is the only ISP to offer high-speed Internet access nationally through all three major broadband technologies: cable, DSL and two-way satellite. Ranging in price from just $39.95 - $49.95 per month, EarthLink offers a broadband option for every budget and need. For more information about this or other EarthLink high-speed products, please call 877-657-6895 or visit http://www.earthlink.net/home/broadband

About J.D. Power and Associates

Headquartered in Westlake Village, Calif., J.D. Power and Associates is an ISO 9001-registered global marketing information services firm operating in key business sectors including market research, forecasting, consulting, training and customer satisfaction. The firm's quality and satisfaction measurements are based on responses from millions of consumers annually.

About EarthLink

EarthLink is the Internet service provider (ISP) solution for an impatient world. Headquartered in Atlanta, EarthLink has earned a national reputation for outstanding customer service, its suite of online products and services, and is ranked Highest in Customer Satisfaction Among High-Speed ISPs, according to J.D. Power and Associates. EarthLink tied for the highest score among high-speed providers in the 2002 study. Serving approximately five million subscribers, EarthLink offers what every user should expect from their Internet experience: high quality connectivity, minimal drop-offs and ISP-generated intrusions, and customizable features. Whether it's dial-up, high speed, Web hosting, or wireless Internet service, EarthLink provides the tools that best let individuals use and enjoy the Internet on their own terms. Learn more about EarthLink by calling (800) EARTHLINK, visiting EarthLink's Web site at www.earthlink.net.

# # #

SUMMARY OF FCC'S *COMPUTER INQUIRY* REQUIREMENTS

The following chart describes current, significant *Computer Inquiry* requirements, both procedural and substantive, designed to promote information services competition as set forth in the FCC's rules, policy and precedent. Each requirement and a detailed description is set forth, citations are abbreviated for ease of reference although requirements have been discussed and enumerated in many different FCC orders and court decisions spanning decades

While grounded in Title II principles that have successfully fostered information services competition, *Computer Inquiry* precedent has presented a challenge in interpretation and enforcement. The array of orders and decisions, the level of BOC discretion in interpreting the requirements, and court remands have contributed to uncertainty and confusion regarding the requirements and have sometimes created difficulties for the FCC and Information Service Providers ("ISPs") in administration and enforcement

1. ***COMPUTER II* Structural Separation Requirements** (Applicable to facilities-based common carriers also offering information services)

Basic Requirement	Description
1. Transmission service must be offered separately from information service 77 FCC 2d 384, 475 (1980), 16 FCC Rcd 7418, ¶ 39 (2001), 47 CFR § 64 702	▪ Facilities-based common carriers must offer to competitive ISPs underlying transmission capacity on the same terms and conditions as to affiliated ISPs ▪ Transport separated from content, no content control ▪ Requirement is grounded in Title II, Section 202, FCC's resale requirements also mandate that wireline common carriers provide telecommunications services to competitors (60 FCC 2d 261(1976), 83 FCC 2d 167 (1980)) ▪ Common carriers may provide information services through a separate corporate entity
2. For BOCs, as dominant carriers, the separate transmission service must be offered via tariff 77 FCC 2d 384, 475 (1980), 16 FCC Rcd 7418, ¶¶ 42-44 (2001)	▪ While BOCs can market telecommunications services with enhanced (information) services, the telecommunications service component must be offered separately to competitive ISPs ▪ Terms must be tariffed and non-discriminatory as between affiliated and competitive ISPs ▪ Terms of service are subject to pre-effective regulatory review, including pricing, other terms of service

II. *COMPUTER III* Comparably Efficient Interconnection ("CEI") Equal Access Requirements (Applicable to the BOCs)

Basic Requirement	Description
1 Interface functionality 104 FCC 2d 958, 1039 (1986), 14 FCC Rcd 4289,4298 (1999)	▪ The BOC must make available standardized hardware/software interfaces to support transmission, switching and signaling functions identical to those used by the BOCs' ISPs ▪ Ensures competitive ISPs know what interfaces are necessary to connect to the BOC network
2 Unbundling of basic services 104 FCC 2d 958, 1036, 1040 (1986), 14 FCC Rcd 4289, 4298 (1999)	▪ The BOC must offer basic transmission service separately from the information service under tariff (*i e.*, same as *Computer II* rule above) ▪ Also, basic service features of transmission service used by carrier's ISP must be also be offered separately and pursuant to tariff ▪ Ensures that an ISP can purchase the underlying telecommunications services
3. Resale of basic services 104 FCC 2d 958, 1040 (1986), 14 FCC Rcd 4289, 4298 (1999)	▪ Same as *Computer II* rule ▪ Designed to prevent improper cost-shifting and anticompetitive pricing in unregulated markets as well as that BOC and non-BOC ISPs pay the same amounts for the underlying BOC telecommunications services
4. Technical characteristics 104 FCC 2d 958, 1036, 1041 (1986), 14 FCC Rcd 4289, 4298 (1999)	▪ Technical characteristics (including bandwidth, bit rates, bit error rates, delay distortions and reliability issues such as mean time between failures, etc.) of transmission service must be equal for all ISPs ▪ Ensures that competitive ISPs receive telecommunications services equal in quality to those which the BOCs' customers receive
5. Installation, maintenance and repair 104 FCC 2d 958, 1041 (1986), 14 FCC Rcd 4289, 4298 (1999)	▪ Time periods for installation, maintenance and repair carrier's ISP and other ISPs must be the same ▪ Ensures that competitive ISPs can offer their customers support services equal in quality as BOC customers receive

Basic Requirement	Description
6 End- user access 104 FCC 2d 958, 1041 (1986), 14 FCC Rcd 4289, 4298 (1999)	▪ End -users of competing ISPs can use same basic services and features as are available to end users of carrier's ISP, including equal opportunities to access basic facilities through derived channels, abbreviated dialing or signaling to access enhanced features, etc ▪ Ensures that competitive ISPs' customers will have the same access as BOC customers to special network features offered in conjunction with information services
7. CEI availability 104 FCC 2d 958, 1041 (1986), 14 FCC Rcd 4289, 4299 (1999)	▪ The BOC CEI offering must be fully operational and available to competing ISPs on the day that carrier's ISP uses it, and carrier must offer CEI services prior to that date for purposes of ISP testing and resolution of problems, allowing opportunity to develop, test and resolve any technical issues ▪ Ensures that non-BOC ISP is not put at a competitive disadvantage by a BOC initiating service before the BOC makes interconnection available to the competitive ISP
8. Minimization of transport costs 104 FCC 2d 958, 1036, 1042 (1986), 14 FCC Rcd 4289, 4299 (1999)	▪ Carriers must make "good faith" and nondiscriminatory efforts to minimize the ISP's costs of transport between carrier and ISP offices, including demonstrating what steps they will take to reduce transport costs for competitors ▪ Ensures that BOCs cannot require competitive ISPs to purchase unnecessarily expensive methods of interconnection with the BOC
9 Recipients of CEI; Availability to All Interested ISPs 104 FCC 2d 958, 1042 (1986), 14 FCC Rcd 4289, 4299 (1999)	▪ Carriers may not restrict the availability of CEI services to any class of customers or competitors ▪ Ensures that BOCs do not engage in anticompetitive teaming with one competitive ISP and against others

III. *COMPUTER III* CEI Procedural Requirements (Applicable to the BOCs)

Basic Requirement	Description
1 Web Posting of CEI plans 14 FCC Rcd 4289, 4297 (1999)	▪ Provides written explanation of compliance with CEI and the telecommunications services used by BOC-affiliated ISPs, provides information to competitive ISPs regarding their interconnection rights, options and methods ▪ Single document aids utility of information and provides benefits over reliance solely on tariffs

IV *COMPUTER III* Open Network Architecture ("ONA") Requirements (Applicable to the BOCs)

Basic Requirement	Description
1 BOC must unbundle elements of its network, regardless of whether used by its affiliated ISP, in an ONA Plan 104 FCC 2d 958, 1064, 1065-1066 (1986), 2 FCC Rcd 3035 (1987), 3 FCC Rcd 1150 (1988), 4 FCC Rcd 1 (1988)	▪ Offers ISPs access to parts of BOC network that would be otherwise unavailable ▪ ONA plans are designed to offer flexible approach that can ensure services can be deployed as circumstances change ▪ ONA features should also include OSS, and other features that are either used by the carrier's ISP or would be useful to ISPs ▪ ONA is "technology-neutral" policy not prescription of a particular network architecture
2. BOC must offer ONA elements (Basic Service Elements ("BSEs"), Basic Serving Arrangements ("BSAs"), Complementary Network Services ("CNSs"), Ancillary Network Services ("ANSs")) under tariff and carrier ISP can only purchase elements under tariff 104 FCC 2d 958, 1064 (1986), 2 FCC Rcd 3035 (1987), 3 FCC Rcd 1150 (1988), 4 FCC Rcd 1 (1988), 5 FCC Rcd 3084, 3087 (1990)	▪ Requires BOC to offer ONA services on "equal access" and nondiscriminatory basis and subject to regulatory (federal or state) jurisdiction and review ▪ BSAs are fundamental tariffed switching and transport services that allow ISPs to communicate with their end-user customers through the BOC network ▪ BSEs are optional unbundled features that an ISP may require or find useful; also defined as building blocks ISPs need to provide service ▪ CNS are optional unbundled basic service features that an end-user may obtain from a carrier to access or receive an enhanced service ▪ ANSs are other features that BOCs may claim are outside of ONA but that are useful to ISPs ▪ OSS capabilities (service order entry and status, trouble reporting and status, diagnostics, monitoring, testing, network configuration and traffic data collection) should be classified as ONA services

Basic Requirement	Description
3 BOC must have procedures for nondiscriminatory installation and maintenance of ONA services, including OSS 104 FCC 2d 958, 1066 (1986), 6 FCC Rcd 7646, 7667 (1991), 11 FCC Rcd 1388,1398-1399, 1427-1428 (1995), 13 FCC Rcd 6040, 6099 (1998)	▪ BOC must have procedures to ensure that installation and maintenance of ONA services is nondiscriminatory, requests (including trouble tickets) are taken on first-come- first-served basis, and that standard intervals for routine installations are made public ▪ If required, letters of authorization prior to initiation of CNS service may not be discriminatory ▪ Resale restrictions may not be discriminatory ▪ OSS may not be discriminatory and BOCs must discuss their ability to offer such services in the future

V. ***COMPUTER III* ONA Procedural Requirements** (Applicable to the BOCs)

Basic Requirement	Description
1 BOC must file and maintain ONA plan at FCC 104 FCC 2d 958, 1064,1067 (1986)	▪ Requires regulatory review and approval of BOC proposed ONA plan in order to relieve BOC of requirement to file a CEI Plan for each enhanced service that it offers.
2. BOC must provide 90-day notice and obtain FCC approval prior to ONA plan amendment 104 FCC 2d 958, 1068 (1986), 13 FCC Rcd 6040, 6086 (1998)	▪ The 90-day time period is necessary to permit ISPs to develop new offerings on a competitive basis since without the CEI Plan, ISPs will not have specific notice that a carrier is offering a new enhanced service.
3. BOCs must specify procedures for ISPs to request and receive new ONA services (120-day process), BOCs must honor ISP requests for NIIF technical assistance to evaluate feasibility of new ONA service 104 FCC 2d 958, 1066 (1986), 4 FCC Rcd 1, ¶ 397 (1988), 5 FCC Rcd 3084, 3091 (1990), 6 FCC Rcd 7646, 7654 (1991), 13 FCC Rcd 6040, ¶¶83-84 (1998)	▪ BOCs must provide new elements to ISPs if ISP can show (1) market demand, (2) technical and cost feasibility, and (3) utility to ISPs The BOC must describe in detail the criteria that it will use in determining when an ISP inquiry constitutes a complete request for a new ONA service and provide an evaluation of whether it will provide the service or the specific reasons for not offering a given service If an ISP finds the BOC response unsatisfactory, it may seek redress from the FCC by filing a petition for declaratory ruling

Basic Requirement	Description
4 BOCs required to file annual ONA report 6 FCC Rcd 7646, 7649-7650 (1991)	▪ Report should contain deployment schedules for ONA for ONA services and disposition of new ONA service requests and requests previously deemed technologically infeasible; SS7, Intelligent Network (IN), and ISDN deployment information, new ONA services available via SS7, IN and ISDN, progress at NIIF on long-term uniformity issues; progress on providing ISPs with BNA, calling number ID and call detail services; progress on developing OSS and ISP access to OSS, list of BSEs used by BOC's ISP, unbundling of new technologies
5. BOCs required to provide Semi-Annual ONA report 6 FCC Rcd 7646, 7650 (1991)	▪ Report should contain: consolidated matrix of ONA services in federal and state tariffs, ONA Services User Guide; updated information on 118 categories of network capabilities requested by ISPs and how they were addressed, wire center deployment information
6. BOCs required to file Quarterly Nondiscrimination Reports 104 FCC 2d 958, 1055-1056, 1066 (1986)	▪ Report compares timeliness of installation and maintenance of categories of ONA services to BOC ISP with that of a sampling of all customers. Report must include total orders, total and percent due date missed, and average intervals
7. BOCs required to file an Annual affidavit 3 FCC Rcd 1150, 1161, n 154 (1998)	▪ If BOC affidavit demonstrates that it lacks ability to discriminate in installation or maintenance, then it may file Quarterly Nondiscrimination Report